In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1485

TEX TAN WELHAUSEN COMPANY AND TEX TAN WESTERN LEATHER COMPANY, DIVISION OF TANDY CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

On May 4, 1970, this Court (397 U.S. 819) granted the Company's earlier petition for a writ of certiorari, vacated the judgment of the court of appeals enforcing the Board's order, and remanded the case to that court "for further consideration in light of *H. K. Porter Co.* v. *National Labor Relations Board,* 397 U.S. 99." On remand, the court of appeals reconsidered the Board's order, modified its prior decision (419 F. 2d 1265; Pet. App. A7–A17) so as to deny enforcement of certain portions of the order which the court concluded were incompatible with *Porter,* but

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adhered to that decision in all other respects (Pet. App. A1–A5).[1]

[1] The Board's decision and order and the first decision of the court of appeals are summarized in our brief in opposition to the Company's earlier petition for certiorari. Br. in Opp., No. 1288, 1969 Term, pp. 3–18. In short, the Board found, *inter alia*, that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act by manifesting overall bad faith during the course of negotiations with the Union, the Meat Cutters, and by insisting on unilateral control over piecework standards while denying employees the right to file grievances respecting that subject (Pet. App. A129, A142–A143).

As a remedy for these unfair labor practices, the Board ordered the Company, *inter alia*, to cease and desist from:

"(a) Insisting, as a condition to entering into an agreement with Amalgamated Meatcutters and Butcher Workmen of North America, AFL–CIO, or any other exclusive bargaining representative of its employees in the appropriate unit, upon a provision depriving the employees of their right to file grievances on the establishment of standards for piecework.

"(b) Insisting, as a condition to entering into an agreement with the Union or any other exclusive bargaining representative of its employees in the appropriate unit, upon excluding from such agreement any definition or guiding principle as to productivity speed ratings on the basis of which production standards for piecework are to be established.

"(c) Refusing to incorporate into a written contract with the Union its agreement as to productivity speed ratings upon the basis of which production standards for piecework are to be established.

"(d) In any other manner insisting, as a condition to entering into an agreement with the Union or any other exclusive bargaining representative of its employees, upon being given the right to fix the rates of pay of its piecework employees unilaterally. * * *" (Pet. App. A172–A173.)

On remand, the court of appeals denied enforcement of paragraphs (a), (b), and (d) of the above order, because "the Board has attempted just as it did in *Porter*, to remedy the Companies' bad faith approach to the negotiations by compelling the inclusion of contractual provision the Board believes to be just" (Pet. App. A3).

In the present petition, petitioner contends that the court of appeals erred in not setting aside the Board's entire order. This contention does not warrant further review.

1. Essentially, the argument is that the Board's finding of a refusal to bargain in good faith cannot be reconciled with *Porter* because, petitioner asserts, "* * * the Board decision itself included a finding that the employer wanted a contract with the Union" (Pet. 9). This contention, however, rests on a version of the facts which is contrary to the findings of the Board and the court below. As the court of appeals noted in its first opinion (419 F. 2d at 1268; Pet. App. A10), the Trial Examiner, whose findings were adopted by the Board, found that "an overall appraisal of Tex Tan's bargaining compels the conclusion that it did not approach the negotiations 'with an open mind and purpose to reach an agreement consistent with the respective rights of the parties.' "[2] And, as the court properly ruled (*ibid.*), the "record unquestionably supports the Trial Examiner's conclusion * * * that during these sessions Tex Tan was really engaged in * * * mere 'shadow boxing to a draw.' * * *" Insofar as the petition seeks to challenge this conclusion, it presents only an evidentiary issue which does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

[2] Petitioner's contrary assertion (Pet. 5) is based on an excerpt from the Examiner's decision, which when read in its entirety, does not support petitioner. See Pet. App. A144.

2. The further contention (Pet. 2, 12–14) that the court below erred in not excising from the Board's order paragraph (c.) (*supra* n. 1)—requiring that petitioner cease and desist from "refusing to incorporate into a written contract * * * its agreement as to productivity speed ratings upon the basis of which production standards for piecework are to be established"—rests on the factual premise that no agreement had been reached on that subject. The Board found (Pet. App. A123–124), however, as did the court below (Pet. App. A3–A4), that the Company had in fact agreed with the Union on this provision. Accordingly, the refusal to strike paragraph (c) of the Board's order was proper. *H. J. Heinz Company* v. *National Labor Relations Board,* 311 U.S. 514.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

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[3] Finally, petitioner's contentions concerning the propriety of the Board's award of vacation pay (Pet. 3, 16–18) and its action in relying on matters allegedly outside the scope of the complaint (Pet. 3, 18–19) present no issues involving *Porter* and hence are beyond the scope of the Court's remand. Moreover, these issues, too, turn on the particular facts and thus do not warrant review by this Court.

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